No. 230

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Supreme Court of the United States

STATES MARINE CORPORATION,
Petitioner,

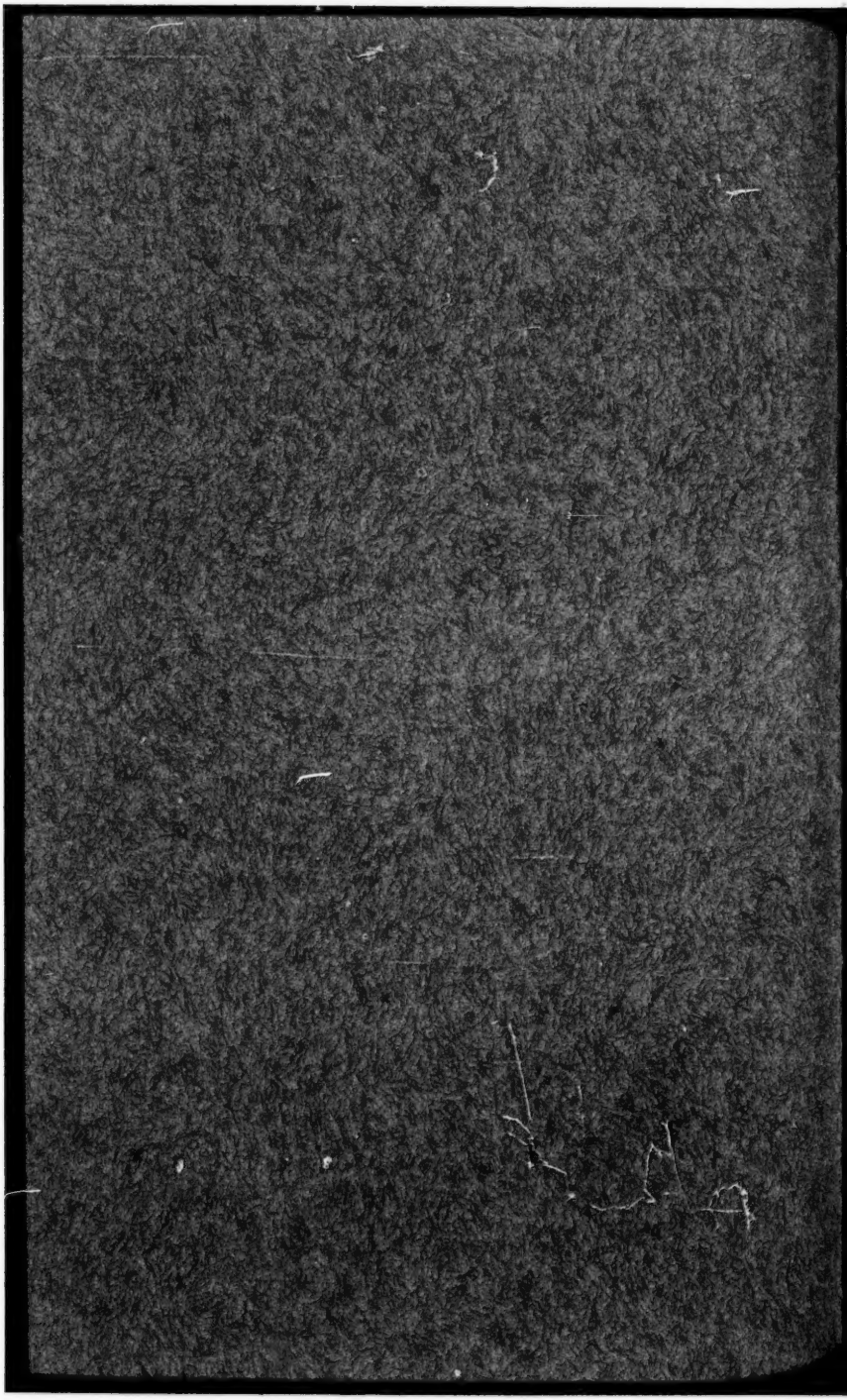
against

YNGVAR AABY, HELGA LYCHE, ERLING AABY and E. B. AABYE'S REDERI AKTIESELSKABET,
Libelants Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF

CHARLES E. HICKOX,
CARTER KNAPP,
Counsel for Petitioner
120 Broadway,
New York 5, N. Y.

Parmelee Printing Corp., 32 Thomas St., New York 7, N. Y., U. S. A.



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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States.

The petition of States Marine Corporation respectfully shows to this Honorable Court as follows:

NATURE OF THE PROCEEDINGS.

This is a petition for a writ of certiorari to review a decree of the United States Court of Appeals for the Second Circuit filed April 12, 1950, affirming the interlocutory decree in admiralty in favor of the libelants entered on January 10, 1949, in the District Court of the United States for the Southern District of New York.

JURISDICTION.

The jurisdiction of this Court to grant a writ of certiorari is provided by Title 28, United States Code, Section 1254.

OPINIONS BELOW.

The opinion of the District Court, 1949, 80 F. Supp. 328, is printed at 470-81 of the record.

The opinion of the Court of Appeals, 1950, 181 F. 2d. 383, is printed at 490-497 of the record.

STATEMENT OF THE FACTS.

The libel was filed on behalf of the owners of the Motor Vessel *Tento* for failure of the charterer to proceed with a twelve months time charter of the Motor Vessel *Tento*. A tender of the vessel under the time charter was made in the harbor of Sandefjord, Norway, at 3:30 p. m. on December 31, 1937, and a certificate of delivery was signed by charterer's representative. Twenty to thirty minutes later, before or at the canceling hour under the charter, the shaft of the lubricating oil pump broke and the vessel drifted for about three hours, when she anchored. Twenty-four hours later, on January 1, the vessel was towed by a tug to a repair yard where the shaft was repaired on shore in about two and a half days.

On January 3 charterer in New York learned of the breakdown and sent a cable to the owners in Norway declining to go on with the charter on the ground that the vessel had been tendered for delivery in an unseaworthy condition. The vessel sailed from the repair yard the same day.

Both courts found that the vessel was unseaworthy when she was tendered at 3:30 p. m. on December 31, although charterer was not aware of the condition.

The vessel had been undergoing extensive repairs at Sandefjord for two weeks, until 3 p. m. on 31 December. The canceling date was 4 p. m. the same day.

The owners had deliberately avoided a test that would have disclosed whether the vessel was seaworthy. The specifications by owners' consulting engineer for the repairs required that after the completion of the repairs there should be a "running a trial trip at sea with the ship where all the machinery shall work properly for their full duty." 474. Such a trial trip would have required about eight hours. *Bagger,* 1112. It would not only have resulted in the discovery of the defective shaft, but would have prevented the owners from making any tender of delivery before the canceling date.

The charter which was made on August 10, 1937, represented the vessel as "with hull, machinery and equipment in a thoroughly efficient state" and contained the following express warranty

> "Witnesseth, That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, * * * vessel on her delivery to be * * * tight, staunch, strong and in every way fitted for the service."

There was the further provision:

> "14. * * * should vessel not have given written notice of readiness on or before December 31st 1937, but not later than 4 p. m. Charterers or their Agents to have the option of canceling this Charter at any time not later than the day of vessel's readiness."

The owners never gave any notice of actual readiness. The only notice of any kind given by the owners was by telegram and letter of December 29, *fol.* 803:

> "TENTO OWNERS GIVE NOTICE READY FOR DELIVERY SANDEFJORD FRIDAY 31 DECEMBER TWELVE NOON * * *."

The vessel was not ready when that notice was given, nor was she ready at noon on December 31. She was undergoing extensive repairs and did not leave the repair yard till 3:10 p. m. on December 31. *Log, fol.* 1359.

The vessel was not ready during the two and a half days that elapsed after the breakdown. No additional notice of readiness was ever given.

The fact is that the vessel was never "ready" until 3 January, fol. 104, *Log,* 295, the very day the owners received the charterer's notice of cancellation. *Ex. P,* 491; *Aaby,* 423.

THE DECISIONS BELOW.

The District Court found that, despite failure of the owners to comply with the absolute warranty that the vessel on delivery should be "tight, staunch, strong and in every way fitted for the service" before 4:00 p. m. December 31, the owners had made a good delivery of the vessel because the charterer's agent had accepted it although without knowledge that there had been a complete breach of the warranty of seaworthiness.

It was held that the rights of the parties were governed by Clause 15 of the charter providing that hire

should cease during loss of time from damage to machinery. *Fol.* 1424.

The United States Court of Appeals affirmed the decision of the District Court, but on a different ground. The Court of Appeals found that the unseaworthy condition of the vessel although "the defect was not remediable at sea", p. 492, and two and a half days were required to repair the broken shaft on shore, p. 491, was an insubstantial breach of the owners' obligation under the charter and did not warrant the action of the charterer in what the court called a repudiation of the charter. p. 496.

The Court of Appeals seems to have disagreed with the ground on which the District Court based its decision for it was said, p. 496:

> "We need not deal with the contention of the owners that, the charter having been entered upon, the breakdown clause or the clause excepting accidents to machinery controls, except to point out how such a contention appears to be inconsistent with the whole body of the law relating to seaworthiness. See *The Caledonia,* 157 U. S. 124, *The Carib Prince,* 170 U. S. 655."

Reference in greater detail to the facts in the case and the decisions of the courts will be found in accompanying brief.

PRINCIPAL QUESTIONS PRESENTED.

1. Where a time charter party has been made containing an absolute warranty by the owner that a vessel shall be tendered to charterer "tight, staunch,

strong and in every way fitted for the service", is not the charterer entitled to exercise its contract right to refuse the vessel if it is in fact unseaworthy at the time of delivery and breaks down within 20 to 30 minutes after the vessel has been wrongfully tendered for delivery?

2. Was the Court of Appeals correct in holding that unseaworthiness at time of tender was an insubstantial breach of the warranty of seaworthiness and fitness not justifying rescission? The unseaworthiness consisted of a defective shaft which broke 20 to 30 minutes after tender of the vessel and immobilized the vessel for two and a half days while repairs were being made on shore.

3. Was the Court of Appeals correct in depriving the charterer of its right to cancel in accordance with the terms of clause 14 of the charter in the absence of notice of readiness before 4 p. m. on December 31? Such a notice was not given and could not truthfully have been given under the facts of the case.

REASONS WHY THE WRIT SHOULD BE GRANTED.

1. The decision of the Court of Appeals is wholly at variance with long established law. Indeed, the Court states the law only to disregard it. Thus it is said, p. 493:

> "The general American view is that a 'warranty' is a guaranty that a certain fact is true. See 4 Williston on Contracts §1075. Thus,

> when an owner 'warrants' that a certain situation exists, he promises that it does exist, and the obligation of the charterer is conditioned upon the existence of that situation. *Davison* v. *Von Lingen,* 113 U. S. 40.
>
> "By this definition, then, any breach of warranty permits rescission, as well as an action for damages."

The warranty in the charter party was a condition on which the entire commercial venture was based. There was an unquestioned material breach of the warranty which should have permitted rescission by the charterer.

However, the Court states that certain English authorities have given rise to some confusion. It is not suggested that there is any confusion in the American authorities, although there is a reference to American decisions in insurance cases that do not seem to have anything to do with the matter under discussion.

The Court, at p. 494, then discussed whether the undertaking of seaworthiness by an owner is an implied warranty or a condition and after referring to some authorities, says, p. 494:

> "But this would not seem to explain the unquestioned line of authority that the undertaking of seaworthiness is absolute in the sense that the owner's exercise of due diligence to discover defects is immaterial."

The Court cites *Work* v. *Leathers,* 97 U. S. 379; *The Caledonia,* 157 U. S. 124; *The Carib Prince,* 170 U. S. 655.

These authorities do not leave the law in any state of confusion. It has always been fundamental that when an owner chartered a vessel representing that it was seaworthy and in every respect fitted, the owner made a warranty which was a condition on which the entire contract rested.

It is not clear just what the Court means by the use of the word "confusion".

It is then said, p. 495, that,

> "repudiation by a charterer is permissible only where the breach of the owner's undertaking of seaworthiness is so substantial as to defeat or frustrate the commercial purpose of the charter. The English authorities speak in these terms. * * * There are no American cases to the contrary."

It is submitted that the English authorities do not speak in the terms suggested by the Court. Of the cases cited, *Tarrabochia* v. *Hickey,* 1856, 1 H. & N. 183 and *Tully* v. *Howling,* 1877, 2 Q. B. D. 182, do not deal with warranty of seaworthiness. The third case, *Stanton* v. *Richardson,* 1872 L. R. 7 C. P. 421, does deal with unseaworthiness of a vessel because of condition of her pumps which would have taken seven or eight months to be remedied. As the vessel was chartered for a voyage and the delay would have frustrated the object of the voyage, the charterer was held justified in refusing to supply another cargo. These decisions have not any bearing on the present situation.

The Court, p. 494, then makes the jump of saying that "the undertaking of seaworthiness is to be treated like any other contractual undertaking not expressly

made a condition precedent to a party's performance of his obligations."

This is directly contrary to American law as announced by this Court in *Davison* v. *Von Lingen,* 113 U. S. 40, cited by the Court of Appeals. P. 493.

It is difficult to imagine how the express undertaking of seaworthiness and general fitness and efficiency contracted for by the owner in the charter could be more clearly or definitely made a condition as a basis of a charterer taking the vessel. A charterer has definite obligations to the cargo, both as to the condition of the vessel and the time for receiving the cargo. Indeed, the charterer here had fixed the vessel for a cargo at St. John and had to carry it at a loss by another vessel. Charterer also had a cargo waiting in the Far East to be brought back and that was done by another vessel. 1215. If a charterer cannot rely on an owner's warranty of seaworthiness when the vessel is tendered, there would not seem to be anything to require an owner to comply with his warranty. Under the ruling of the Court of Appeals, a charterer must take a vessel, even though unseaworthy, if the delay necessary to make her seaworthy is a short period compared with the total period of the charter. This ruling is a direct invitation to any unscrupulous shipowner to palm off an unseaworthy ship on an innocent charterer.

It is submitted that this position is wholly unreasonable and commercially impracticable. Business could not be conducted on any such basis.

2. Strong corroboration of the charterer's contention is the circumstance that the owners have never contended at any stage of the present proceedings

that they had complied with the warranty of seaworthiness and fitness and efficiency given in the charter. The owners throughout have evaded that question and put their excuse on the claim that the owners used reasonable care to insure the good condition of the ship and that as there was a minor breakdown, although immediately after delivery, the charterer could not refuse to go on with the charter. The owners deliberately avoided using reasonable and proper care by failing to make the prescribed trial trip at sea after the completion of the repairs which the ship had been undergoing for over two weeks immediately preceding the canceling date. *Aaby,* 455; *Specifications for Repairs,* 474. Owners say that the rights of the parties must be determined by the clauses of the charter which are effective in conditions arising only after a good delivery.

The owners in their brief in the District Court, conceded the correctness of charterer's contention that it was not obliged to accept a vessel tendered in an unseaworthy condition. Thus in the District Court, the owners respondent said:

> "The respondent also cites *N. Y. & Cuba Mail Co.* v. *Eriksen,* 27 Comm. Cas. 330, for the proposition that, when a vessel is tendered under a charter in unseaworthy condition, the charterer has a right to reject her. No one disputes that. * * * The charterer has the undoubted right to reject the vessel for unseaworthiness on tender."

This concession was repeated in appellee's brief, p. 34, in the Court of Appeals.

3. The decision of the Court of Appeals has deprived the charterer of the benefit of Clause 14 of the charter. Under that clause, quoted *supra,* p. 3, unless the owners gave notice of readiness before 4 p. m. on December 31, charterer was entitled to cancel not later than the day of readiness.

It is undisputed that no notice of actual readiness ever was given. A notice of expected readiness was given two days before delivery of the vessel was tendered. She was not ready then, nor was she ready at the time indicated in the notice. Indeed, on the findings of both courts, she was not ready at any time on December 31. Both courts have found that she was in an unseaworthy condition with respect to the shaft of the lubricating oil pump on December 31. This condition existed until 3 January the day when the charterer exercised its right to cancel.

4. Knowledge of the unseaworthiness of the vessel on the part of the charterer certainly would have brought a notice of cancelation on December 31. The owners deliberately neglected to have a sea trial which would have disclosed the unseaworthiness.

This entire contention was ignored by both courts below with the result that the courts have swept away the option given by Clause 14 to the charterer to cancel if the vessel was not ready within the canceling date. Ready meant "tight, staunch, strong and in every way fitted for the service".

5. The commercial contract of the parties was that the vessel at the time of delivery should be "tight, staunch, strong and *in every way* fitted for the ser-

vice." This warranty appears in practically all Time Charter parties. Hence the decision is of general and widespread importance.

The decision of the United States Court of Appeals that the owner does not have to fulfill its absolute warranty and that it only requires "substantial" compliance is a brand new legal doctrine which will have very far-reaching effects on the owners and charterers of ships.

As the Court of Appeals admits of its decision, p. 495,

> "This, it is true, may raise some speculative difficulties"

Such difficulties have not been found in hitherto existing law.

The present time would be a particularly unfortunate one in which to inject a new and strange concept into the fundamentals of the accepted practices of the shipping industry with respect to time charters.

It is submitted that this new doctrine is contrary to accepted American law. It is without any legal justification and should be reversed.

6. It is of substantial public importance that the decision of the Court of Appeals should be reviewed and reversed. If it is allowed to stand, it will set a precedent whereby, despite a shipowner's warranty of seaworthiness and fitness, a time charterer may be required to accept a vessel which may be deficient and unseaworthy, not only as to its machinery, but with respect to requirements of safety at sea. When a time charterer has contracted for a seaworthy vessel, the

charterer should not be subjected to speculative inquiries as to whether the unseaworthiness on tender may come within the varying view of some court as to whether or not it is so substantial as to frustrate the object of the adventure.

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court to review the decision and decree herein of the United States Court of Appeals for the Second Circuit.

Dated: New York, July 25, 1950.

STATES MARINE CORPORATION,

By CHARLES R. HICKOX,
CLETUS KEATING,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.